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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1922.

## No. 396

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY, et al.,
*Appellants,*
vs.
THE STATE OF TENNESSEE, et al.,
*Appellees.*

Appeal from the District Court of the United States for the Middle District of Tennessee.

## BRIEF FOR APPELLEES.

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BAIRD-WARD
NASHVILLE

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*Appellants,*

vs.

STATE OF TENNESSEE, et al,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

## BRIEF FOR APPELLEES

### Statement of the Case

The original bill or petition was filed by the State of Tennessee and its administrative department, the Railroad & Public Utilities Commission of Tennessee, against the United States, to annul and suspend an order of the Interstate Commerce Commission affecting intrastate rates on transportation of stone and gravel for use in road construction, shipped as the property of the Federal, State or Municipal Government, on the ground that the order of the Interstate Commerce Commission is in excess of the power vested in that Commission by Congress.

The order of the Interstate Commerce Commission, directed to all the common carriers by steam railroad in Ten-

nessee, ordered the establishment and maintenance of rates "for the transportation of said commodities in intrastate commerce within the State of Tennessee" exceeding the rates theretofore in effect on such transportation by approximately twenty-five per cent.

Printed Record, p. 40.

The order of the Interstate Commerce Commission was based upon a finding by that Commission that the intrastate rates on such transportation in Tennessee, theretofore maintained, had "resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce."

Printed Record, pp. 38-39.

The "findings" of the Interstate Commerce Commission, and its printed report filed in support of its findings, show that the order of the Commission was based alone upon a finding that the relation of intrastate rates to interstate rates resulted in discrimination against certain persons and localities "in adjoining states"; and that the unjust discrimination against interstate commerce referred to in the findings of the Interstate Commerce Commission consisted alone of such discrimination against persons and localities in states adjoining Tennessee.

There was no finding by the Interstate Commerce Commission that the rates on the intrastate transportation described in the order were so low as to prevent intrastate commerce in Tennessee from contributing its proper proportionate share of the operating expenses and earnings of common carriers by steam railroad in Tennessee.

There was no finding by the Interstate Commerce Commission that the intrastate rates fixed by the Tennessee Commission do not afford the carriers adequate compensation for their services in such transportation.

The findings of the Interstate Commerce Commission were only that intrastate rates on shipments of stone and gravel for use in the construction of highways, consigned to the Federal, state or municipal governments, or their bona fide agents, in their relation to interstate rates on the same character of transportation from points in adjoining states to points within the State of Tennessee, unduly preferred and favored shippers and localities in Tennessee to the prejudice of shippers and localities in such adjoining states.

The Interstate Commerce Commission was without power to make and enforce such an order, because:

1. The preference accruing to governmental shippers found to exist by the Interstate Commerce Commission is expressly permitted by the Interstate Commerce Act of Congress, and is therefore not unlawful nor undue.

2. The power of the Interstate Commerce Commission to adjust and change rates of the common carriers for the purpose of removing a preference is confined to cases wherein the preference found to exist is an unlawful and therefore an undue or unreasonable preference.

3. The finding of the Interstate Commission, that preference resulted to governmental shippers in Tennessee from the relation of intrastate rates to interstate rates, was based alone upon a comparison of maximum intrastate rates with a published schedule of interstate rates which the carriers serving points in Tennessee were and are at liberty to disregard, by carrying the commodities described in the order for such shippers at lower rates, through secret agreements with such shippers authorized by Congress and

by the published regulations of the Interstate Commerce Commission; and therefore, the finding of the Interstate Commerce Commission is not a finding of a real and existing preference sufficient to authorize an order of the Interstate Commerce Commission directing carriers in Tennessee to put in force and maintain increased rates on such transportation wholly within the State of Tennessee.

4. The Interstate Commerce Commission did not find that the lower intrastate rates on governmental shipments of stone and gravel in Tennessee resulted in the failure of intrastate traffic to earn its proportion of the operating expenses and earnings of common carriers in Tennessee, volume of traffic and tariff revenue not being considered by the Interstate Commerce Commission. The order of the Commission was based entirely upon a finding that the relation of the intrastate rates to the interstate rates resulted in preference to shippers and localities in Tennessee to the prejudice of shippers and localities in adjoining states. To remove such discrimination, the order of the Interstate Commerce Commission directed carriers in Tennessee to put in force and maintain increased rates on intrastate traffic throughout the State of Tennessee. Such an order, extending throughout the State, is not supported and can not be sustained by a finding of discriminations against persons or places alone.

The intrastate rates on governmental shipments of stone and gravel for highway purposes which the Interstate Commerce Commission ordered to be increased were the result of an order made by the Railroad & Public Utilities Commission of Tennessee on November 19, 1920, restraining railroads in Tennessee from advancing or increasing their rates and charges on such shipments in Tennessee above rates and charges in effect on such commodities prior to such order.

Printed Record, p. 14.

It is contended by appellants, the Railroad Companies, that the order of the Interstate Commerce Commission can not be successfully attacked in this case because it appears from the record that the rates on the transportation affected, under the order of the Tennessee Commission, were unreasonably low and therefore confiscatory; and that the effect of the refusal of the Tennessee Commission to permit the desired increase in the intrastate rates was to require the carriers affected to grant to governmental shippers in Tennessee a preference by carrying their property at rates less than reasonably compensatory rates, in all of which appellants claim the Tennessee Commission exceeded its lawful authority.

Appellees contend that the validity of the order of the Railroad and Public Utilities Commission of Tennessee is not material to the issues of this case. The Interstate Commerce Commission has no power to act directly upon intrastate rates, save upon a finding that such action is necessary to remove an undue and unlawful prejudice against persons or localities in interstate commerce, or an undue prejudice and discrimination against interstate commerce generally, which latter power was vested in the Interstate Commerce Commission for the first time by the Act of Congress known and referred to as the Transportation Act of 1920. The finding of the Interstate Commerce Commission upon which the order involved in this case was made was only that the lower schedule or level of intrastate rates resulted in undue preference to persons and localities adjoining Tennessee. If such undue and unlawful discrimination existed at the date of the order, the Interstate Commerce Commission had power and authority to make and enforce its order, regardless of whether the lower level of intrastate rates was the result of voluntary action on the part of the carriers or obedience by them to an order of the Tennessee Commission which that Commission was without authority to make. If

such undue discrimination did not exist, the condition precedent to the power of the Interstate Commerce Commission to invade the realm of purely intrastate rates and traffic was non-existent, and the order of the Interstate Commerce Commission was without authority and void.

Appellees further contend however that the order of the Tennessee Commission was a valid exercise of its statutory authority, and is not subject to successful attack by the carriers or other appellants in this case.

## THE PLEADINGS; AND THE PROCEEDINGS IN THE DISTRICT COURT.

The final hearing in the District Court was upon a motion filed by the United States to dismiss the bill. The intervening defendants, the Interstate Commerce Commission, the Nashville, Chattanooga & St. Louis Railway, the Illinois Central Railroad Company, and the Louisville & Nashville Railroad Company, were permitted to adopt the motion to dismiss filed by the United States. The Interstate Commerce Commission filed an answer, but on the hearing of the motion to dismiss, counsel for the Commission agreed that the answer was intended to raise no issue of fact, and consented to a final hearing on the motion to dismiss the bill.

Opinion of District Court, Printed Record, p. 47.
Decree of District Court, Printed Record, p. 52.

The decree of the District Court was that the order of the Interstate Commerce Commission described in the bill,

> "Is adjudged to be void to the extent that the rates therein ordered to be established, put in force and maintained affect or apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is hereinabove adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and that the enforcement thereof be and hereby is perpetually enjoined."
>
> Printed Record, p. 52.

The assignments or specifications of error made by the appellants in this Court do not attack the right of appellees to maintain the suit; and the averments of the original bill setting out the facts entitling appellees to maintain the suit need not therefore be repeated here. They are set out in paragraphs 1 and 2 of the bill.

Printed Record, pp. 1-2.

The bill avers that following the order of the Interstate Commerce Commission known as Ex Parte 74, made July 20, 1920, directing a general increase of 25 per cent in all interstate freight transportation rates and charges, the Railroad and Public Utilities Commission of Tennessee permitted proportionate advances in intrastate freight transportation rates in Tennessee, with certain exceptions. The exceptions consisted of rates on brick, sewer pipe, fertilizer and fertilizer material, and the rates involved in this case, on shipments moving over the rails of ten specified carriers, including the appellants herein. With respect to the rates involved in this case the order of the Tennessee Commission provided:

> "That on car load shipments of stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, County or Municipal authorities, or their bona fide agents, that carriers respondent hereto shall make no advance in the rates and charges over and above those in effect immediately prior to the effective date of the original suspension on these commodities, and
>
> "It is further ordered, That this order shall continue in effect for a period of not less than two years from date when it shall take effect, unless otherwise ordered by this Commission."
>
> Printed Record, pp. 3-4.

The bill then avers that, in December, 1920, certain railroad companies doing business in Tennessee, including appellants, by petition, caused an investigation to be made by the Interstate Commerce Commission with regard to the relation of the intrastate rates which were not advanced to the interstate rates on the same commodities put in force and maintained pursuant to the order in Ex Parte 74; and after investigation and upon consideration of briefs of interested parties, the Interstate Commerce Commission announced its finding that the intrastate rates on common brick and sewer pipe, which were not increased, were not

shown to create any undue or any unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, and persons and localities in interstate commerce, nor any undue or unreasonable or unjust discrimination against interstate commerce.

Original Bill, Printed Record, pp. 4-5

The bill then sets out the findings and the order of the Interstate Commerce Commission with regard to the governmental shipments of stone and gravel which are involved in this case. The order of the Railroad and Public Utilities Commission of Tennessee was made an exhibit to the bill; and the entire report, findings and order of the Interstate Commerce Commission were also made exhibits to the bill, and are copied into the printed record.

The State of Tennessee avers, in paragraph 2 of the bill, that the enforcement of the order of the Interstate Commerce Commission will require the payment from its treasury, and from the treasuries of its various subdivisions, as well as from the Treasury of the United States, large sums of money in freight charges on material purchased by them, for use in the construction of roads and highways in Tennessee, greatly in excess of the amounts required to be paid for such freight rates on the lower level as fixed by the Tennessee Commission. The interest of the State in the lower level of rates as a shipper is thus specifically averred, and is not controverted.

Printed Record, pp. 2-3.

Paragraph IV of the bill avers the invalidity of the order of the Interstate Commerce Commission, as in excess of its power, on the grounds that the prejudice and discrimination found by the Commission to exist were expressly permitted by Section 22 of the Interstate Commerce Act, and were therefore not unlawful; and that the findings of the Commission do not show a real discrimination against in-

terstate commerce; wherefore, the bill avers that the order of the Interstate Commerce Commission is an unwarranted and unauthorized interference with the reserved powers of the State of Tennessee in the control of purely intrastate transportation by common carriers.

Printed Record, pp. 7-10.

The prayer of the bill is that the order of the Interstate Commerce Commission be declared null and void as in excess of the power and authority conferred upon the Interstate Commerce Commission by Congress, and that said order be enjoined, set aside, annulled and suspended, valid and binding upon no one from the date of its promulgation and publication by the Interstate Commerce Commission. The bill also prays for general relief.

Printed Record, pp. 10-11.

The District Court, in a written opinion set out in full in the printed record, held that the appellee, the State of Tennessee, with or without the support of the order of the Railroad and Public Utilities Commission of Tennessee, has a right to be heard as to the substance of its complaint.

Printed Record p. 50.

Construing Section 22 of the Interstate Commerce Act, which provides that nothing therein shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State or Municipal governments, the District Court held that its effect was to leave the Interstate Commerce Commission without jurisdiction to forbid railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight, excluding "this particular traffic from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom of discrimination."

Printed Record, pp. 50-51.

The District Court held that the order of the Interstate Commerce Commission deprived carriers in Tennessee of the right, expressly granted by the Act of Congress, to carry the property of a governmental shipper at lower rates than required of individuals. The District Court held that the existence of this power in the carriers to grant them a preference is of value to governmental shippers, regardless of whether, at the time of the order of the Interstate Commerce Commission, the carriers desired to grant such preference to governmental shippers or not.

Printed Record, p. 51.

Holding that the Interstate Commerce Commission is without authority to make an order applicable solely to interstate traffic, forbidding a preferential rate to a state, city or county, the District Court then held that the Interstate Commerce Commission was likewise without power to make such an order applicable to intrastate commerce.

Printed Record p. 57.

In order to make it certain that governmental shippers and no others should obtain the benefit of such lower rates, the decree of the District Court suspended and annulled the order of the Interstate Commerce Commission only to the extent that the rates therein ordered to be established and maintained affect or apply to transportation of the commodities named for the United States, State or Municipal governments, the title to which has passed to the government or is vested in it at the point of the origin of the transportation.

Printed Record, p. 52.

The decree of the District Court is sustained on the record and should be affirmed.

## BRIEF OF THE ARGUMENT.

### I.

### The Interstate Commission Found Discrimination Against Persons and Places Alone.

The Interstate Commerce Commission did not find that the maintenance of the schedule of rates on governmental shipments of stone and gravel for use in the construction of highways in Tennessee would result in the failure of intrastate traffic in Tennessee to yield its proportionate share of the operating expenses and earnings of interstate carriers operating in Tennessee.

This is indicated by the fact that, although the general schedule of intrastate freight transportation rates in Tennessee were increased proportionately to the increase in interstate rates resulting from the order of the Interstate Commerce Commission in Ex Parte 74, that Commission did not find that the failure of the Tennessee Commission to permit such increase in the intrastate rates on sewer pipe and common brick resulted in any discrimination against interstate commerce.

Exhibit "B" to Bill; Printed Record, p. 38.

The only reference in the report of the Interstate Commerce Commission to the amount of revenue which the intrastate traffic in Tennessee on governmental shipments of stone and gravel produced or would produce, under either schedule of rates, is contained in the following language:

> "From figures based on actual movements of stone and gravel during the year ended September 30, 1920, respondents estimate that the refusal of the Tennessee Commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern Railways, in the aggregate, about $16,445 annually."
>
> Report of Interstate Commerce Com., Printed Record, p. 38.

This purports only to state an estimate of the carriers. It is not a finding of the Interstate Commerce Commission. No reference to this estimate is made in the Commission's "Findings."

In the report of the Interstate Commerce Commission, it is also stated that the interstate rates on municipal stone and gravel between points in Tennessee and points in adjacent states are shown by numerous comparisons to be relatively just and reasonable; and that in authorizing an increase in the rates on stone and gravel for commercial purposes within the State, the Tennessee Commission "impliedly approved the general level of those rates as increased."

Printed Record, p. 38.

This is not a finding of fact by the Interstate Commerce Commission that the increased rates on municipal stone and gravel within the State of Tennessee are reasonable and just, nor that the lower schedule of rates on the same shipments within the State of Tennessee were unreasonable or unjust, or insufficient to adequately compensate the carriers for the services performed for the shippers. That question was not considered by the Interstate Commerce Commission. The volume of the traffic and the revenue produced thereby were given no consideration, nor was the cost of such transportation to the carriers considered.

*Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S., 268.

*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S., 601.

*Norfolk & Western Ry. Co.* v. *Conley*, 236 U. S., 608.

The findings of fact by the Interstate Commerce Commission recite that the relation of the schedule of intrastate rates to the increased schedule of interstate rates *"between points in Tennessee and points in adjoining states,"* (Italics

ours) has resulted in the past and will result in the future "in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce."

Printed Record, pp. 38-39.

Not only does the Commission thus confine its finding to a discrimination against persons and localities in interstate commerce, but it specifies that the discrimination thus found to exist is confined to persons and localities in states adjoining Tennessee.

The additional words employed by the Interstate Commerce Commission in the findings of fact; "in unjust discrimination against interstate commerce," are restricted by the preceding reference to person and localities, and are not additional findings of fact. These words are merely descriptive of the effect of the undue prejudice to persons and localities in interstate commerce in states adjoining Tennessee, as found by the Commission. In other words, the unjust discrimination against interstate commerce found by the Commission consists of the alleged prejudice to shippers and localities in states adjoining Tennessee resulting from the relation of the intrastate rates to the interstate rates.

*Illinois Central R. R. Co.* v. *Public Utilities Com.*, 245 U. S., 493, 508.

There is nothing in the report of the Interstate Commerce Commission filed in support of its findings to sustain any other construction of the meaning of the phrase "unjust discrimination against interstate commerce," as it is used in the "findings" of the Commission.

The report contains no such consideration of alleged revenue loss to the carriers in Tennessee from their failure to secure the desired increase in intrastate rates on municipal shipments of stone and gravel, as in the reports of the Interstate Commerce Commission in the proceedings in Wisconsin and New York rates, considered by this Court in the cases of *Railroad Commission of Wisconsin et al*, v. *C. B. & Q. Railroad Company*, and the *State of New York et al*, v. *the United States et al*, both decided February 27, 1922.

The finding of fact upon which the order involved in this suit is based is, therefore, that the failure of carriers in Tennessee to increase their intrastate rates on municipal shipments of stone and gravel has resulted in undue preference to persons and localities in Tennessee as against persons and localities engaged in interstate commerce between points in Tennessee and points in adjoining states.

## II.

### The Discrimination Found by the Interstate Commerce Commission is Expressly Permitted by Congress, and is Therefore Not Unlawful.

If the order of the Interstate Commerce Commission can be sustained at all, it is because of the authority vested in the Commission by Section 3, of the Interstate Commerce Act, which is as follows:

> "That it shall be unlawful for any common carrier, subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."
>
> 24 Statutes at Large, 380.

The power of the Interstate Commerce Commission to require the removal of unjust discrimination which is within the prohibition of the foregoing section of the Interstate Commerce Act, even though it be the result of the relation of purely intrastate rates to interstate rates, is not questioned by the appellees in this proceeding.

But it is not every preference or discrimination which is so within the power of the Interstate Commerce Commission to remove. It is only a preference which, because it is "undue or unreasonable," is declared by Congress to be unlawful, that the Interstate Commerce Commission is empowered to remove by a readjustment of rates.

*Manufacturer's Railroad Co.* vs. *U. S.*, 246 U. S. 456, 481;

*Interstate Commerce Com.*, vs. *B. & O. R. R.*, 145 U. S. 263.

In *Manufacturers Railroad Company* vs. *United States*, 246 U. S. 481, The Supreme Court said:

> "It is not any and every discrimination, preference and prejudice that are denounced by the Commerce Act. Section 3 renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended par. 15 (36 Stat. at L. 551, chap. 309, Comp. Stat. 1916, par. 8583) it is rates, regulations, or practices that, in the opinion of the Commission, are 'unjustly discriminatory, or unduly preferential or prejudicial,' etc., to which the prohibition is to be applied.
>
> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing

that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or, for some other reason, amount to an abuse of power."

*Manufacturers R. Co.*, vs. *United States*, 246 U. S., 481.

The Transportation Act of 1920, in paragraph 4 of Section 13, as held by the Supreme Court in *Railroad Commission of Wisconsin et al*, vs. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S., 563, for the first time vested the Interstate Commerce Commission "with a direct power to remove any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

In the Transportation Act of 1920 the discrimination against interstate commerce which may be removed is qualified by the phrase "undue, unreasonable or unjust"; and, as in the case of prejudice against individuals or localities in interstate commerce, it is only unjust, undue or unreasonable discrimination against interstate commerce which the Interstate Commerce Commission is empowered to remove by the section of the Transportation Act of 1920 referred to.

41 Statutes at Large, 484.

That which is expressly allowed can not be an undue, unjust or unreasonable discrimination against interstate commerce. Such discriminations only are forbidden and made unlawful.

The Transportation Act of 1920 is an amendment to the original Interstate Commerce Act, and its provisions are to be construed and enforced as a part of the original act, modified and qualified by other pertinent and relative provisions of the original act, to the same extent as Section 3 of the original Interstate Commerce Act is modified and qualified by other provisions of the same Statute.

Section 22 of the Interstate Commerce Act provides:

"That nothing in this Act shall prevent the carriage, storage or handling of property free or at reduced

rates—for the United States, State or Municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary employment in such transportation," etc.

24 Statutes at Large, 387, as amended by 25 Statutes at Large, 862;

28 Statutes at Large, 643.

This section of the Interstate Commerce Act was construed by this Court in *Interstate Commerce Commission* vs. *Baltimore & Ohio Railroad*, 145 R. R. U. S. 263, decided soon after the enactment of the Statute. In that case the general purpose of the Interstate Commerce Act was stated in accord with the understanding of that purpose which now exists, and this Court there said:

"It is not all discriminations or preferences that fall within the inhibition of the Statute; only such as are unjust or unreasonable."

*Interstate Commerce Com.*, vs. *B. & O. R. R. Co.*, 145 U. S. 264.

The question for discussion in the case just cited was whether the inhibition against unreasonable and undue preference in interstate commerce applied to the act of a railroad company in selling a single ticket covering the transportation of ten or more persons from one place to another at a rate lower than the aggregate of the rates for individual tickets covering the transportation of the same number of persons between the same points. It was contended for the railroad company that such a group ticket was a commutation passenger ticket, a class of tickets which Section 22 of the Interstate Commerce Act provided the railroad should have the right to issue and sell. In disposing of this contention it was necessary for the Supreme Court to determine the intention of Congress in the enactment of Section 22. Construing the section in order to ascertain the will of Congress, the Supreme Court held as follows:

"The unlawfulness defined by sections 2 and 3 con-

sists either in an 'unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; immates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the Act."

*Interstate Commerce Com.*, vs. *B. & O. R. R. Co.*, 145 U. S., 263, 276-277.

The foregoing holding of the Supreme Court was not *obiter dictum* as is contended in the brief filed in this Court by appellants. This is clearly shown by the context of the language hereinabove quoted.

The only construction to which the language of section 22 of the Interstate Commerce Act is susceptible is that the transportation by common carriers of the property of the United States, or a state or municipal government, at lower rates than individuals are required to pay for the transportation of like property, does not constitute an unreasonable or unjust or unlawful discrimination against such individual.

Carriers can not exercise the privilege of transporting governmental property "free" or at reduced rates, without discriminating in favor of governmental owners as against individual owners of similar property transported by them.

When a carrier grants a reduced rate on road stone to a

municipality, and other carriers entering the same city do not meet the reduced rate, prejudice to the owners of stone quarries located on the lines of the latter carriers will inevitably result. In such cases Congress has permitted the public interest to outweigh the interests of individuals.

To hold, therefore, that in exercising the privilege or permission granted carriers by section 22, no discrimination against other shippers or localities must result, would be to effectively destroy the permission granted by the statute.

The Interstate Commerce Commission has recognized the freedom from control in the transportation of governmental property, resulting to the carriers from the provisions of section 22. The Commission has issued Conference Rulings for the guidance of railroads and shippers, interpreting that part of Section 22 which is applicable to the transportation of governmental property, copied into the bill in this case, as follows:

> "33. Reduced Rate Transportation for Federal, State and Municipal Governments.* Under Section 22 of the Act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government, and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 308e, 218, 244, 311 and 452.)"
>
> "36. Rates on shipments for the Federal government. If title to property such as postal cards, passes to the government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see

ruling 452; also *United States* v. *A. & V. Ry. Co.*, 40 I. C. C., 406.)"

"208 (e). Section 22 of the act authorizes carriers to grant free or reduced rate transportation of property for the United States, state, or municipal governments, or for charitable purposes of for exhibition at fairs or expositions. It also authoritizes free or reduced fare transportation of certain specified persons. *These special provisions and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff rates or fares;* and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting and observing tariffs must be complied with."

Printed Record, p. 8.

At one time, in 1908 and 1909, the Interstate Commerce Commission maintained a Conference Ruling, known as No. 65, authorizing the granting of the reduced rates to traffic consigned to a governmental authority, without the limitation stated in Ruling No. 36, above quoted, that the property must be shipped as the property of the government in order to secure the benefit of a reduced rate. Subsequently Rule No. 65 was rescinded and Rule 36 reinstated, the Interstate Commerce Commission stating its reasons for such action as follows:

"Rule 65 was adopted with the idea that publication of special rates upon traffic consigned to the Government would reduce the price of various materials purchased by it for delivery at designated points by approximately the difference between the regular rate and the lower rate which carriers were willing to accept on Government business. But further consideration of the rule itself, as well as of certain transactions which were possible thereunder, convinced the Commission that restoration of its original rule was necessary to prohibit discriminations which, if not unlawful, were at least contrary to the spirit of the statute. Having reached the conclusion that it is improper to permit the benefit of special rates on Government material to

> accrue to anyone other than the Government itself, the petition herein must be denied and the complaint will there be dismissed."
>
> *Havens & Co.*, vs. *C. N. W. Ry. Co.*, 20 I. C. C. Rep., 156, 158.

In its Conference Rulings and in the quotation hereinabove made from *Havens Co.* vs. *C. N. W. Ry. Co.*, 20 I. C. C. Reports, 156, it appears that the Interstate Commerce Commission has consistently recognized that the privilege granted by section 22 of the Commerce Act, in the transportation of governmental property, is one which is contrary to the spirit and purpose of the Act in so far as the transportation of the property of individuals is concerned.

It does not follow from the construction given to section 22 of the Interstate Commerce Act by appellees, as contended by appellants, that transportation of governmental property is wholly removed from the jurisdiction and control of the Interstate Commerce Commission. In the Commission's report in *United States* v. *Alabama & Vicksburg Railway Co., et al*, 40 I. C. C. Reports 405, it was held by the Commission that it had authority to prescribe reasonable ratings for car load shipments of stamped envelopes and post cards, shipped as the property of the United States, "although the carriers and the government may agree upon some other rate." The effect of such action of the Commission, however, in fixing a reasonable rate which may be charged, was stated in its report, as in Conference Ruling 208, as follows:

> "The tariff rate or classification rating is the *maximum* which the carriers may *demand* from the government." (Italics ours)
>
> *United States* v. *Alabama & Vicksburg Ry. Co., et al*, 40 I. C. C. 405.

In the brief filed for the United States in the District Court, numerous proceedings were cited wherein the government had invoked the jurisdiction of the Interstate Com-

nerce Commission over rates and charges for the carriage f its property. In each of these cases, however, the juris- iction invoked was to declare a maximum rate which the arriers might exact from the Government for the services erformed. Appellees do not contend that the Interstate Commerce Commission may not fix a maximum interstate ate for the transportation of Governmental property. Their ontention is that the power of the Commission is limited o the determination of the maximum rate which may be harged.

The cases cited by the United States in the District Court how no other exercise of power by the Interstate Com- nerce Commission than the fixing of a maximum rate to e charged.

*United States* v. *N. Y. P. & H. R. R. Co.*, 15 I. C. C., 233.

*United States* v. *B. & O. R. Co.*, 15 I. C. C., 470.

*United States* v. *Adams Express Co.*, 16 I. C. C., 394.

*United States* v. *Denver Rio Grande*, 18 I. C. C., 7.

*United States* v. *Alabama & Vicksburg Ry.*, 40 I. C. C., 405.

*United States* v. *Union Pacific R. R. Co.*, 28 I. C. C., 518.

*Boise Lumber Co.* v. *Pacific & Idaho Northern Railroad Co.*, 33 I. C. C., 109.

*United States* v. *Sumpter Valley Ry. Co.*, 53 I. C. C., 607.

The Conference Rulings hereinabove set out regulating ransportation of governmental property are manifestly uthorized and required by section 22 of the Interstate Com- erce Act, and are not questioned by appellants. They e wholly inconsistent with any power and authority in the nterstate Commerce Commission to prevent discrimina- on and preference or advantage in the transportation of overnmental property, whether such preference accrue one governmental shipper to the prejudice of another,

or, indirectly, to one locality to the prejudice of another locality. The effect of the Conference Rulings is to deprive the Interstate Commerce Commission of all means of determining the existence of preference and discrimination in such transportation.

The prejudice and discrimination found by the Interstate Commerce Commission to exist in the relation of the rates involved herein exists, if at all, not by reason of rates put into effect by a single carrier, but by reason of the relation of rates of a number of carriers. Unless section 22 is to be construed as in the case of *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Co.*, cited above, one carrier may not transport the property of a governmental agency free or at reduced rates unless all other carriers serving the same territory grant a like pivilege and concession to the same governmental agency and other governmental agencies similarly located. The permission granted to carriers by section 22, to carry the property of a governmental agency free or at reduced rates, is not therein made to depend upon similar action by other carriers.

It is pointed out in the bill that the effect of the order of the Interstate Commerce Commission is to place intrastate shippers and localities at an unjust and unreasonable disadvantage which Congress did not contemplate or authorize, since, while the order requires intrastate rates to be maintained at the level fixed by the order, the Interstate Commerce Commission is powerless to require the interstate rates on the same character of shipments to be maintained at the same level.

Printed Record, 9-10.

Reply to this contention is made by counsel for the Interstate Commerce Commission, by referring to the proviso of the order, which declares that nothing therein shall be

construed as "authorizing any common carrier to * * * maintain a rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points."

Printed Record, p. 40.

Manifestly this provision of the order does not relieve the situation pointed out. It applies only to a disparity in the rates of a single common carrier, and does not apply to the case of unjust discrimination resulting to intrastate shippers from reduced rates granted by some carriers in interstate commerce, which can not be met by other carriers in intrastate commerce serving the same point of destination in Tennessee, because the order of the Interstate Commerce Commission requires the maintenance of all of their intrastate rates at a fixed level. Application to the Interstate Commerce Commission for relief in a particular case could not relieve the situation, for the reduced rates may be granted by interstate carriers by secret agreements which may be entirely concealed from the shippers injuriously affected thereby.

No instance can be pointed out wherein this Court has upheld the authority of the Interstate Commerce Commission to regulate intrastate commerce with results so unjust and prejudicial to shippers affected.

Appellees do not contend and have never contended that section 22 vests any governmental agency with power to require common carriers to transport governmental property free or at reduced rates.

The contention of the appellees on this branch of the case is only that, since Congress has declared that the carriers may by their own volition prefer governmental shippers in rates and charges for the transportation of governmental

property, any preference or prejudice which may result from the relation of rates on such transportation is not unlawful and cannot, therefore, be found by the Interstate Commerce Commission to be undue, unjust and unreasonable.

Congress has manifested no intention to authorize the Interstate Commerce Commission to exercise direct authority over commerce wholly within a state, in order to remove a discrimination created by state imposed rates, which discrimination, if created by rates voluntarily imposed by the carriers themselves, would not be unlawful, and, therefore, neither unjust nor undue.

The discrimination found by the Interstate Commerce Commission to exist in the relation of intrastate rates to interstate rates on the transportation of governmental property being a lawful discrimination, the Interstate Commerce Commission has no power to order the establishment and maintenance of a purely intrastate rate to remove it.

## III.

### The Discrimination Found by the Interstate Commerce Commission is Not a Real Discrimination, and Does Not Support the Order Fixing Intrastate Rates.

The Conference Rulings and the published opinion of the Interstate Commerce Commission, cited hereinabove, expressly limit the power of the Interstate Commerce Commission, under section 22 of the Commerce Act, to the fixing of a maximum rate which carriers may charge for the transportation of governmental property.

The interstate rates on the transportation of governmental property in interstate commerce between points in Tennessee and points in adjoining states are, therefore, to be considered only as maximum rates, from which the carriers, by express authority of the Interstate Commerce

Commission are permitted to depart at will, by charging and collecting lower rates and charges than those established by the order in Ex Parte 74, through secret agreements with governmental shippers not required to be disclosed to the Interstate Commerce Commission.

The Interstate Commerce Commission has confessed itself powerless to fix a legal rate for interstate shipments of governmental property, from which interstate carriers may not depart.

Such a maximum rate, from which a carrier is at liberty to depart at will, by published tariff or by secret agreement, can form no basis or measure or standard for a finding of discrimination by comparison with other published rates.

Undue prejudice and preference and discrimination between shippers can exist only by reason of the relation of rates legally fixed, to which the carriers affected are required to adhere.

In the report of the Interstate Commerce Commission, pursuant to which the order in question was made, the Commission observed: "Respondents show that they follow the *general policy* of publishing in the regular manner such municipal rates as they maintain."

Printed Record, p. 32.

The finding of the Interstate Commerce Commission of undue preference to Tennessee shippers and localities, and undue prejudice to shippers and localities in adjoining states, was therefore based upon a comparison of intrastate rates with "the general policy," voluntarily pursued by the carriers who were respondents to the proceeding before the Commission.

Such a comparison would not support a finding of preference and prejudice, even if only interstate rates were involved.

In *Louisville & Nashville Railroad Company* v. *Maxwell*, 237 U. S., 94, the Supreme Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, *but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.*" (Italics ours.)
>
> *Railroad* v. *Maxwell*, 237 U. S., p. 97.

A legal rate which can constitute a measure of discrimination is a rate which has the certainty and to which the strict adherence is required, described in the foregoing quotation. It is the certainty with which interstate carriers are compelled to adhere to their published and duly filed rates, as indicated in the foregoing quotation from *Railroad* v. *Maxwell*, which constitutes the basis of a finding of discrimination; and which was the foundation of the holding of this Court in the Shreveport rate case (*Houston E. & W. T. Ry. Co. et al.* v. *United States*, 234 U. S., 343) and other similar cases, that the Interstate Commerce Commission may order interstate carriers to make their intrastate rate structure conform to the level of their published and duly filed interstate rates, when it is shown that the two structures are related in the manner described in those cases.

It is respectfully submitted that this Court would not have upheld the Interstate Commerce Commission in its order affecting intrastate rates in the Shreveport case, if the level of interstate rates to which the intrastate rate structure was made to conform had been one from which the interstate carriers were at liberty to lawfully depart by secret agreement with interstate shippers, as in the present case.

In extending the power of the Interstate Commerce Commission to purely intrastate commerce, in order to adequately protect interstate commerce, the Supreme Court has withheld the power except in cases wherein the necessity and basis for the extension of Federal authority appeared with a high degree of certainty. In a recent case the Supreme Court said:

> "In construing the Federal statutes enacted under the power conferred by the Commerce Clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. (Citing cases.) This being true of an Act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State Rate Statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty."
>
> *Illinois Central R. R.* v. *Pub. Utilities Com.*, 245 U. S., 493, 510.

When it is shown that the discrimination against interstate commerce, to remove which the order of the Interstate Commerce Commission is applied to purely intrastate traffic, appears only from a comparison of published rates, from which the carriers are at liberty to depart, with maximum intrastate rates, the "high standard of certainty" is not present, and it should be held that the finding of discrimination is wholly insufficient to warrant direct interference by the Federal authority with intrastate commerce.

The Conference Rulings of the Interstate Commerce Commission, quoted hereinabove, not only authorize interstate carriers to withhold from the Commission tariffs for the transportation in interstate commerce of governmental property for governmental shippers, but authorize such carriers to depart from tariff rates and fares on such transportation filed with the Commission.

The rate actually charged and collected by the interstate

carrier for the transportation in interstate commerce of governmental property is, therefore, not a rate fixed by law, but is a rate fixed according to the will and volition of the carrier. Such a charge or rate cannot serve as the basis of an order of the Interstate Commerce Commission requiring an increase of the intrastate rate to the level of the interstate rate.

> Minn. Rate Cases (*Simpson* v. *Shepard*), 230 U. S., 352, 417.

In the Minnesota Rate Cases, the Supreme Court, after upholding the power of the State to regulate rates for transportation wholly intrastate, subject only to the exercise by Congress of its constitutional power to regulate interstate commerce, said:

> "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border is foreign to our jurisprudence.
>
> "If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."
>
> Minnesota Rate Case, 230 U. S., 352, 417.

The authority of the Interstate Commerce Commission over intrastate rates on governmental property is confined to the fixing of a maximum rate, as hereinabove shown, for

the protection of the shipper. Such a maximum may or may not be the rate charged and collected and cannot, therefore, be a true measure or standard for the exercise of Federal authority over intrastate rates, based upon a finding of unjust discrimination against persons and localities in interstate commerce. The only true measure for such finding is the interstate rate actually charged and collected. The Interstate Commerce Commission is without power to ascertain the rate or charge which is collected but if it is ascertained, it is a rate fixed only by the carrier for interstate transportation, and, under the holding in the Minnesota Rate Case, cannot be the basis of a lawful order of the Interstate Commerce Commission directing that intrastate rates be fixed in accord with it.

In *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Co.*, decided by this Court on February 27, 1922, 257 U. S., 563, the Supreme Court concluded its opinion as follows:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate Commerce."
>
> *Railroad Comm. of Wisconsin* v. *C. B. & Q. Railroad Co.*, 257 U. S., 563.

The discrimination found to exist in the relation of rates involved in this case cannot be the "real discrimination" which this Court referred to in this quotation as the condition precedent to the exercise by the Interstate Commerce Commission of control over intrastate rates. The

principle underlying the holding in the foregoing quotations from the Minnesota Rate Cases is adhered to and repeated in this quotation from the Wisconsin case.

From the foregoing argument and authorities, appellees contend:

1. That the discrimination against interstate commerce, resulting from preference to governmental shippers and localities in Tennessee to the prejudice of shippers and localities in adjoining states, is a lawful preference, not prohibited by Congress, which the Interstate Commerce Commission is without authority to remove.

2. That the findings of fact by the Interstate Commerce Commission, upon which its order was made, were based alone upon the relation of maximum intrastate rates with maximum interstate rates, voluntarily filed and published by interstate carriers, from which they are at liberty to depart at will; from which it appears that no real discrimination was found to exist which could authorize an order of the Interstate Commerce Commission affecting purely intrastate commerce. Whatever discrimination may result from the relation of such rates is the result of a rate voluntarily fixed and charged by the interstate carrier to which the Interstate Commerce Commisison is without authority to require intrastate rates to be conformed.

## IV.

### The Order of the Interstate Commerce Commission Can Not Be Sustained by a Finding of Discrimination Against Persons and Places Alone.

In *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Co.*, decided February 27, 1922, the Supreme Court had under consideration the validity of an order of the Interstate Commerce Commission directing an increase in all intrastate passenger and bag-

gage rates and charges corresponding to the increases which the Interstate Commerce Commission had previously ordered in interstate rates, on the ground that the lower level of intrastate rates and charges created undue and unjust discrimination against interstate commerce. The order directed increases in fares "between all interior points, although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all." The Supreme Court held:

> "We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone."
>
> *Railroad Comm. of Wisconsin et al.* v. *C. B. & Q. Railroad Co.*, 257 U. S., 563.

In *Illinois Central Railroad Co.* v. *Public Utilities Comm.*, 245 U. S., 493, 509, the Supreme Court, quoting from *American Express Co.* v. *South Dakota*, 244 U. S., 617, said:

> "But where, as here, there is a conflict between the Federal and the State authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under State authority unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."
>
> *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 256 U. S., 493, 509.
>
> *American Express Co.* v. *South Dakota*, 244 U. S., 617.

The order in this case was based upon a finding of discrimination against persons and localities in adjoining states to Tennessee. The order directs an increase in intrastate rates between all interior points in Tennessee. The foregoing authorities clearly show that such an order based upon such a finding of discrimination was beyond the power of the Interstate Commerce Commission to make.

## V.

### The Order of the Tennessee Commission; Its Validity and Materiality.

The District Court found that the order of the Tennessee Commission which gave rise to the proceeding before the Interstate Commerce Commission was a valid exercise of State power, but also held that if there had been no order by the State Commission, the State and its municipalities would have the right to negotiate with the railroads for the preferential treatment authorized by section 22 of the Interstate Commerce Act, and to obtain such discrimination in their favor if they could; a right denied and forbidden by the Interstate Commerce Commission herein.

Printed Record, pp. 49-50.

It is contended by appellants that the order of the Tennessee Commission required carriers in Tennessee to transport governmental property between points in Tennessee at rates which would not afford the carriers adequate compensation for the services performed.

If this were true, the fact would not justify the order of the Interstate Commerce Commission. The proceedings upon which the order was based were manifestly instituted for the purpose of removing discrimination against interstate commerce.

> "Proceedings to remove unjust discrimination are directed only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."
>
> *American Express Co.* v. *South Dakota*, 244 U. S., 617, 624.

It is only a finding, supported by material evidence, that unjust discrimination exists which can justify an order of the Interstate Commerce Commission affecting purely intrastate rates.

In the Shreveport Rate Case (*Houston E. & W. T. R.*

*Co.* v. *U. S.*), 234 U. S., 350, 357, the Supreme Court, after quoting and construing section 3 of the Interstate Commerce Act, said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this Court in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S., 352."
>
> Shreveport Rate Case (*Houston E. & W. T. R. Co.* v. *U. S.*), 234 U. S., 357.

If the Interstate Commerce Commission had found upon evidence that the intrastate rates fixed by the Tennessee Commission were so unreasonably low as to cause intrastate commerce to fail to produce its proportionate share of the operating expenses and earnings of interstate carriers, the Interstate Commerce Commission would not have had the power to order the increase, regardless of the reason for the lower level of intrastate rates, because Congress has denied it the power to require carriers to maintain and adhere to any rate for the transportation of governmental property, either in interstate or intrastate commerce.. The Interstate Commerce Commission, however, did not find that the intrastate rates failed to produce the proper proportionate share of expenses and earnings, and in the absence of such finding certainly had no jurisdiction to make an order directing an increase of intrastate rates for the purpose of affording to the carriers adequate compensation for the particular services performed for governmental shippers in Tennessee.

In its report, the Interstate Commerce Commission said:

> "In authorizing an increase in the rates on stone

and gravel for commercial purposes the Tennessee Commission impliedly approved the general level of those rates as increased."

Printed Record, p. 38.

Approval of a general level of rates does not support a finding that a lower rate on a particular class of transportation is unjust to the carriers or insufficient to produce adequate compensation for the services performed. Volume of traffic and the circumstances under which the traffic is handled are elements which must be considered in determining whether a particular rate on a particular class of traffic is adequately compensatory.

In the brief filed in this Court for appellants, at page 34, it is stated:

> "It is common knowledge of which this Court will take judicial cognizance, that the governments, State and Federal, have entered upon a colossal road-building program. That the tremendous tonnage incident to the construction of these roads is to be withdrawn from the provisions of the Act when consigned to the government and State and their political subdivisions is unbelievable."

In making a classification for rate-making purposes of stone and gravel for use in the construction of highways, when consigned to a governmental agency, it may be presumed, in view of the foregoing statement, that the Tennessee Commission had in mind a very large tonnage of such commodity in aid of the road-building program of the State and Federal Governments.

Of the rate-making power of the Interstate Commerce Commission, the Supreme Court, in *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S., 268, said:

> "In exercising its power of supervising such rates the Commission is not bound to reduce the rates upon all classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwith-

standing that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate."

*Minneapolis & St. Louis R. R. Co.* v. *Minn.*, 186 U. S., 268.

In *Smyth* v. *Ames*, 169 U. S., 541, the Supreme Court said:

"Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

*Smyth* v. *Ames*, 169 U. S., 541.

In *Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S., 601, the Supreme Court said:

"The case of *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S., 257, 46 L. Ed., 1151, 22 Sup. Ct. Rep., 900, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the Court observed, was intended to show that 'if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.' It was said that it was 'quite evident' that this testimony had 'but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried.'"

*Northern Pacific R. R. Co.* v. *North Dak.*, 236 U. S., 601.

In the case just cited the Court also referred to *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, which involved the validity of an ordinance of the City of New York fixing rates for gas supplied for general consumption in the city, and providing a lower rate for gas furnished to the city itself. The Court said:

> "It was said by the Court that the criticism of the 'wholesale' rate to the city was met by the fact that the total returns for the sale of gas were adequate. It was not established in that case that this 'wholesale' rate required a service without substantial compensation in addition to cost."
>
> *Northern Pacific R. R. Co.* v. *North Dak.*, 236 U. S., 601.

In *Norfolk & W. R. Co.* v. *Conley*, 236 U. S., 608, the Supreme Court said:

> "The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern P. R., Co.* v. *North Dakota*, decided this day (236 U. S. 585, ante, 735, 35 Sup. Ct. Rep. 429), makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."
>
> *Norfolk & W. R. Co.*, v. *Conley*, 236 U. S., 608.

The record does not show whether or not, prior to the order of the Tennessee Commission under consideration, railroads in Tennessee had filed with that Commission special tariffs for road-building material, when consigned to a governmental agency. If necessary to sustain the order of the Tennessee Commission, in the absence of proof, it should be presumed that such tariffs had been filed.

In *Pennsylvania R. R. Co.* v. *Towers*, 245 U. S., 11, cited in the opinion of the District Court herein, the Supreme

Court, after referring to the holding in *Norfolk & Western Railroad Co.*, v. *Conley*, quoted above, said:

> "Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service."
>
> *Pennsylvania R. Co.* v. *Towers*, 245 U. S., 11.

The Interstate Commerce Commission has itself recognized that stone intended for road-building purposes is of such a nature as to support a special rate for its transportation. In the Commission's report in *State of Maryland* v. *Pennsylvania Railroad Co., et al*, 30 I. C. C. Reports 22, 25, the Interstate Commerce Commission had under consideration proposed increased rates "for the transportation of Interstate shipments of crushed stone for road-making purposes." In considering the reasonableness of the proposed rate on such commodity, the Interstate Commerce Commission exercised its common knowledge, without reference to any proof in the case, by the following finding:

> "Road stone is a very low grade commodity; it loads generally about sixty thousand pounds to the car, requires only ordinary transportation equipment, and is free from claims for damage in transit."
>
> 30 I. C. C. Reports, 22, 25.

The reports of the Interstate Commerce Commission also contain another instance of the practice of making a different rate on stone for road purposes from the rate on stone for commercial purposes. In *Louisiana Rates*, 60 I. C. C., 378, the Commission stated that it was shown in argument that the Illinois Central Railroad Company, one of the appellants herein, had filed with the Commission schedules of interstate rates for transportation of "municipal sand and gravel," for streets, etc., which were lower than the

interstate rates on *commercial shipments* of sand and gravel from and to the same points.

60 I. C. C., reports 378.

With these instances of the implied approval of the Interstate Commerce Commission of the practice of making a different rate for transportation of municipal stone and gravel for road purposes from the rate between the same points on commercial shipments of stone and gravel, it can not be reasonably argued, without proof and without a finding of fact by the Commission, that the order of the Tennessee Commission was intended as a preference to governmental shippers in Tennessee and was not based upon substantial differences in the traffic affected.

Not only is the commodity in question described by the Interstate Commerce Commission as a low grade commodity, but it is conceded by appellants that the Tennessee Commission had reason to contemplate movement of a tremendous tonnage of the commodity shipped as the property of the State and Federal Governments in Tennessee. It is manifest that these conditions were such as to justify a finding by the Tennessee Commission that transportation of road stone and gravel for governmental agencies in Tennessee required a lower rate than commercial shipments of stone and gravel.

The holdings of the Supreme Court cited and quoted hereinabove show that these conditions would have justified special consideration and special rates in interstate commerce, and it is held by the Supreme Court of Tennessee that, the general purpose of the Tennessee statute being the same as the general purpose of the Interstate Commerce Act, the decisions upon the construction of the Federal statutes are authoritative upon the construction of the Tennessee statute.

*New River Lumber Co.* v. *Tenn. Rwy. Co.* 145 Tenn., 266, 284.

The Railroad & Public Utilities Commission of Tennessee was created by, and its duties and powers are defined by Chapter 10 of the Public Acts of 1897, as amended by Chapter 390 of the Public Acts of 1907 and Chapter 92 of the Public Acts of 1915. Neither of the amendatory acts contains provisions applicable to this case. Pertinent provisions of the original act are as follows:

"SEC. 8. *Be It Further Enacted*, That authority is hereby vested in the Railroad Commission of Tennessee, and it is hereby made its duty, to supervise and fix the rates, charges and regulations of Railroad freight and passenger tariffs and to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different Railroads in this State. The Commission shall have power to make all needed rules for its government and for its proceedings and regulate the mode and manner of all investigations and hearings of Railroad Companies, and other parties, before it, and to adopt and enforce such rules and regulations and modes of procedure as it may deem proper for the hearing and determination of all complaints made by any Railroad Company or other parties; * * * * * * *"

"SEC. 15. *Be It Further Enacted*, That if any such common carrier shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, firm or corporation, a greater or less compensation for any services rendered in the transportation of any kind of property upon such railroads within this State than it charges, demands, collects or receives from any other person or persons, firms or corporations for doing for him or them a like service in the transportation of a like kind of property under substantially like circumstances and conditions, and if such common carriers make any preference between the parties aforesaid, in furnishing cars or motive power for the purpose aforesaid, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.

"SEC. 16. *Be It Further Enacted*, That if any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use

in this State, it shall be deemed guilty of extortion, which is hereby prohibited and declared unlawful.

"SEC. 17. *Be It Further Enacted*, That it shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."

"SEC. 24. *Be It Further Enacted*, That this Act shall not prevent any Railroad Company from transporting freight free of charge, or at reduced rates, for any religious, charitable or benevolent purpose, or for any industrial exposition, fair or association of a public nature, or for transporting immigrants into this State, or persons prospecting with a view of locating or bringing immigrants into this State, or for pleasure excursions. However, nothing in this Act shall be construed so as to prevent the railroads of this State from giving special rates to encourage infant manufacturing industries, and for the encouragement of any other new business or industry, or for the transportation of any perishable goods;

That such transportation shall be furnished without discrimination, and under such rules and regulations as the Commission may prescribe."

Acts of Tennessee for 1897, Chap. 10.

Construing these sections of the Tennessee Act, the District Court held:

"By Section 8 it has power—'* * * to supervise and fix the rates * * * of railroad freight and passenger tariffs on the different railroads in this state.'

"Clearly this authority covers the action which has been here taken, unless there is restriction elsewhere in the act. Sections 15 and 17 prohibit any carrier from receiving from any person or corporation a greater or less compensation than it charges any other person or corporation for doing a like service in the transportation of like property under substantially like circumstances and conditions, and from giving any undue or unreasonable preference or advantage to any particular person or corporation or any particular description of traffic. These provisions are not direct limitations upon the power of the commission to authorize rates which do make discrimination; they rather imply the power of the commission to permit preference and

discrimination if the commission shall decide that it is not undue or unjust or that the services involved are not under like circumstances and conditions; and their utmost indirect effect is to prohibit the fixing of such discriminatory rates as are in fact undue and unjust. It is distinctly held in *Interstate Commerce Commission* vs. *Baltimore & Ohio Railroad*, 145 U. S. hereafter discussed, that a preferential rate given to the state or municipality is not necessarily unjust or undue; and it follows that sections 15 and 17 do not necessarily deprive the Commission of jurisdiction to allow such preferential rates.

"Section 24 of the Tennessee Act is somewhat similar to section 22 of the Interstate Commerce Act, and provides that the law should not prevent any railroad company from transporting freight at reduced rates for certain specified purposes, among which shipments to a state or municipality are not mentioned. However, we do not think this enumeration of permitted preferences must be taken as exclusive. Each one of the enumerated preferences involves a benefit which, if public at all, is so indirect that the right to make the preference would be doubtful unless it were specifically given. The enumeration should not be construed to exclude a case where the public benefit is as direct as it is when a state or municipality actually pays the freight. As the Supreme Court said of a similar section in 145 U. S. at page 278,—'This section is illustrative, rather than exclusive.'

"If there ever was any doubt of the right of such a commission to fix a rate for a particular service under special conditions at a figure less than the maximum allowed for such general service (*Lake Shore Railroad* vs. *Smith*, 173 U. S. 684, 693) that doubt cannot survive the decision in *Pennsylvania Railroad* vs. *Towers*, 245 U. S. 6, 17."

Printed Record, pp. 49-50.

The construction given the Tennessee statute by the District Court is obviously correct; and the citations hereinabove made of decisions of the Supreme Court show clearly that a preferential rate given to the State or a municipality is not necessarily unjust nor undue.

The District Court further held as follows:

"In *Interstate Commerce Commisison* v. *Baltimore & Ohio Railroad Company*, 145 U. S., 263, 278, Section

22 was under consideration and it was expressly said that even in the absence of this section free or reduced transportation of the property of the United States or states or municipal governments would not necessarily be an unjust discrimination. This is obvious if for no other reason than because freight charges which are paid by the public must be in one way or another assessed back against the public, including the railroad, in the form of taxes, as well as because transportation for the public may be exacted in partial consideration for the public rights which the carrier has received. *It cannot be thought that transportation furnished to private shippers and that furnished to the public are given under substantially similar circumstances and conditions.*" (Italics ours.)
Printed Record, pp. 50-51.

If any attack can be made in this case on the order of the Tennessee Commission, it is a collateral attack, and if it can be conceived that transportation of stone and gravel for a state or municipality or for the Federal government, for use in road-building purposes, can be performed under circumstances and conditions which do not attend the transportation of these commodities for idividuals for commercial purposes, then it should be presumed that the Tennessee Commission found that such difference existed in the traffic affected by its order. At least, it does not appear from the record in this case that the rate fixed by the Tennessee Commission for intrastate transportation of road stone and gravel for road-building purposes, transported for the Federal, state or municipal governments, does not afford the carrier adequate compensation for the services performed.

If the order of the Tennessee Commission should be construed as granting a preference to governmental shippers, favoring them over individual shippers in intrastate traffic, then, as found by the District Court, following the holding of the Supreme Court in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S., 278, such a preference is necessarily neither unjust nor undue, and the Ten-

nessee Commission's order would not be void on that account. And there being no finding by the Interstate Commerce Commission that such preferential rates on governmental shipments in Tennessee resulted in the failure of intrastate traffic as a whole to yield its proportionate share of the earnings and expenses of interstate railroads in Tennessee, the fact that such preference was granted to governmental shippers could not sustain the order of the Interstate Commerce Commission.

Appellees contend, therefore, that the order of the Tennessee Commission fixing the intrastate rates in question was a valid exercise of the reserved powers of the State through its departmental agency.

But regardless of the validity of such order of the State Commission, the action of the Interstate Commerce Commission can only be sustained upon a finding that the intrastate rates resulted in an unjust and unlawful discrimination against interstate commerce, and that such discrimination was real and substantial. In the absence of such a finding, the carriers affected would be required to resort to a proceeding directly attacking the order of the State Commission to establish its invalidity, the Interstate Commerce Commission being without jurisdiction, and its order void.

In spite of all collateral questions raised by appellants, the principal question recurs. Carriers may prefer a governmental shipper in the transportation of its property. If such preference is granted to a municipality in the transportation of road stone purchased by it from a quarry served by the carrier, and other carriers serving the same municipality from other quarries do not grant the same preference, such other quarries and their owners are prejudiced. Congress has declared that, in so far as interstate commerce is concerned, such a prejudice is neither unjust nor unreasonable, and the Supreme Court has held that

this would be true regardless of the specific permission of Congress. The discrimination is therefore not unlawful, and the Interstate Commerce Commission is without power to remove it when it results from the relation of rates in interstate commerce. It is likewise without power to remove such discrimination when it results from the relation of intrastate rates to interstate rates.

The decree of the District Court was therefore correct, and should be affirmed.

Respectfully submitted,

W. H. SWIGGART, JR.,
*For Appellees.*

FRANK M. THOMPSON,
*Of Counsel.*

FILED
MAY 27 1922
WM. R. STANSB
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1921

No. 988 396

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, Appellants,

*vs.*

Appeal from the District Court of the United States for the Middle District of Tennessee.

THE STATE OF TENNESSEE, Et Al., Appellees.

## Reply of the State of Tennessee and Other Appellees to the Petition of the Louisville & Nashville Railroad Company, The Illinois Central Railroad Company, and The Nashville, Chattanooga & St. Louis Railway, for a Supersedeas, Pending Final Disposition of the Appeal.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1921.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINIOS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

*Appellants,*

VS.

THE STATE OF TENNESSEE, ET AL.,

*Appellees.*

REPLY OF THE STATE OF TENNESSEE AND OTHER APPELLEES TO THE PETITION OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, FOR A SUPERSEDEAS, PENDING FINAL DISPOSITION OF THE APPEAL

*May It Please the Court*:

## STATEMENT OF THE CASE.

For a statement of the case, the Appellees quote from the opinion of the District Court, copied into the printed record as follows:

> "The State of Tennessee, acting both in its own behalf and upon the relation of the Railroad and Public Utilities Commission of Tennessee, joined with that commission in filing a bill of complaint directed against the United States. Since the purpose of the bill was

to enjoin the enforcement of an order made by the Interstate Commerce Commission, proceedings were had pursuant to the jurisdiction and practice fixed for the Commerce Court under Sections 207, 208 and 209 of the Judicial Code and the Act of October 22, 1913. (U. S. C. S. of 1916, Section 998.) Pursuant to the latter section, a motion for a preliminary injunction regularly came on to be heard before the court as now constituted. On such hearing the Illinois Central Railroad Company and the Nashville, Chattanooga & St. Louis Railway were permitted to intervene and to join in the motion made by the United States to dismiss the bill for lack of equity. The Interstate Commerce Commission also was permitted to and did intervene as a defendant and file its answer. Upon the hearing of the motion to dismiss, it was stated by counsel for the United States and for the intervening railroads that if the motion to dismiss were overruled, they did not desire to file any answer or further pleadings. It was also agreed between counsel for the State of Tennessee and counsel for the Interstate Commerce Commission that the latter's answer was not intended to raise any issue of fact and that the case was appropriate for final hearing on the bill and answer. It was therefore agreed by counsel for all parties that the hearing upon the motion and upon bill and answer should be treated as a final hearing, and that a final decree might be entered thereon.

"Prior to July 29, 1920, the freight rates in Tennessee and adjoining states upon broken stone, cement and similar road building materials had been established by the Interstate Commerce Commission and by the State Utilities Commission within their respective fields at the same amounts in each. On the day named the Interstate Commerce Commission by its order '*ex parte* 74' authorized an increase of 25 per cent in freight rates in this general territory in interstate traffic and the railroads here intervening adopted this increase. They also filed with the State Commission a tariff making the same proportionate advance in their intrastate rates on all traffic. This was suspended by the State Commission approved the increase as to all intrastate traffic, excepting that in road building materials consigned to the United States, or the state or municipality therein, or consigned to a contractor for such public use. As to this excepted traffic all the railroads were directed to maintain the formerly existing and lower rate.

"Thereupon the railroads applied to the Interstate Commerce Commission to have the intrastate rate on this excepted traffic fixed by that Commission so as to include the same 25 per cent advance which had been given on all interstate traffic. The railroads alleged that the order of the State Commission, which in effect, prescribed for the intrastate traffic in these fields a rate 20 per cent lower than that which had been established for the interstate shipments of the same materials, was an undue and unjust discrimination against interstate traffic. There was a full hearing before the Interstate Commerce Commission and it found that in this respect undue preference to persons and localities in Tennessee and unjust discrimination against interstate commerce did result, which should be removed by raising the intrastate rate on these articles shipped to the United States or to the state or counties or cities, to the same price charged against all shippers or consignees. This order was entered August 3, 1921, and was identified as No. 12132. This is the order, the enforcement of which this suit is brought to enjoin.

"The general power and jurisdiction of the Interstate Commerce Commission to fix an intrastate rate, as to which it had found the existence of discrimination and prejudice against interstate commerce, were not distinctly challenged by the bill; and since the hearing of the motion herein such jurisdiction and power have been definitely declared by the Supreme Court in the case of *Wisconsin* v. *United States*, decided February 27, 1922. The only question which is here for decision is one arising under Section 22 of the Interstate Commerce Act, which so far as it is here material declares:

" 'That nothing in this Act shall prevent the carriage, storage or handling of property, free or at reduced rates for the United States, state or municipal governments, * * * * * *'

"Whether the effect of this section is to deprive the Commission of jurisdiction to make an order preventing discrimination and preference in shipments for these favored parties is the controlling question."

The conclusions of the District Court were stated as follows:

"What has so far been said leads to the conclusion that the Interstate Commerce Commission would be

without authority to make an order applicable solely to interstate traffic and forbidding a preferential rate to a state or a city or county. The right of this Commission to regulate or fix an intrastate rate, whether arising under the former laws or under the Transportation Act of 1920, is collateral and incidental to its rights to regulate interstate traffic; the branch may overhang the intrastate field only because the branch is essential to the maintenance of the tree planted in interstate soil. The incident cannot exist without the principal fact to which it is collateral; the branch cannot keep its position if there is no tree. The Interstate Commission's whole power to regulate interstate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce must be modified by the same exception.

"We think the Interstate Commission order should be enjoined and the State Commission order should remain in force. Manifestly this result should follow only so far as the freight in question is to be carried 'for the United States, state or municipal governments.' The preference should not be determined by the mere fact that the government is or is not shipper or consignee. Precisely the proper division seems to be made by the Interstate Commerce Commission Conference Ruling, No. 36, which permits the preference to be given only in case the title to the property passes to the government or is vested in the government at the point of the origin of its transportation. (*Havens* v. *Chicago Railway*, 20 I. C. C. 156) No other formula now occurs to us by which it can be made certain that only the government will get the benefit of the preference."

Opinion of District Court, Printed Record, p.——.

The material part of the final decree entered by the District Court provides as follows:

"That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee, entered August 3, 1921, and identified on the docket of said Commission as No. 12132, directing Steam Railroad Companies to establish, put in force and maintain rates for the transportation within the State of Tennessee of stone and gravel in carloads,

when for use in the construction of public highways and consigned to federal, state, county or municipal authorities or their *bona fide* agents, in excess of rates charged by said companies on such transporation at and prior to the time of the entry of said order, is adjudged to be void to the extent that the rates therein ordered to be established, put in force and maintained affect or apply to such transportation, for the United States, state or municipal governments, of stone and gravel, the title to which has passed to the Government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is hereinabove adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and the enforcement thereof be and hereby is perpetually enjoined."

Printed Record, p.——.

The validity of no order of the Railroad and Public Utilities Commission of Tennesee is involved in this case. While the effect of the injunctive order of the District Court is to remove the order of the Interstate Commerce Commission as a barrier to the enforcement of the State Commission's order fixing maximum rates on the intrastate traffic affected, the question here presented is one involving the power of the Interstate Commerce Commission to invade the realm of purely intrastate rates and traffic, and that power cannot be sustained or defeated according to the validity of any action of the State Commission.

However, the validity of the order of the State Commission which provoked the proceedings before the Interstate Commerce Commission, in which proceedings the order No. 12132 was made, was considered by the District Court, and on the final hearing, argument will be made showing the validity of that order under the State statutes. It is not considered necessary to go into this collateral question on this preliminary motion.

Appellees assert that the order of the Interstate Commerce Commission which the petition for *supersedeas* seeks to revive is so clearly and obviously invalid, as in excess of the power of the Interstate Commerce Commission, the

Court, in its discretion, should deny the petition for *supersedeas;* and, in addition, Appellees contend and insist that the special situation created by the application of the carriers alone for the *supersedeas* is such that the Court, sitting as a court of equity, should deny the petition.

The statute authorizing the appeal denied to the District Court the right to grant Appellants a *supersedeas*, and vested that right alone in the Supreme Court, or a Justice thereof, emphasizing the intention of Congress that the *supersedeas* should be allowed only in the exercise of the discretion of the highest court of the land.

Judicial Code, Sec. 210.

## I.

## THE MERITS OF THE CASE ARE SO CLEAR THAT A SUPERSEDEAS SHOULD NOT BE ALLOWED

The order of the Interstate Commerce Commission, to annul which this suit was brought, contains the following:

> "It is ordered that the common carriers by steam railroad, parties to this proceeding, (naming them . . .) according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate rates for the transportation of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county or municipal authorities, or their *bona fide* agents, and *to establish, put in force and maintain* rates for the transportation of said commodities in intrastate commere within the State of Tennessee which shall exceed the rates of said respondents for the transportation of said commodities in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said respondents and now in effect under *Ex Parte* 74 referred to in said report, in said respondents' rates for the transportation of said commodities in interstate commerce within the State of Tennessee and between points

in the State of Tennessee and points in adjoining states."

See Exhibit "A" to Original Bill.

(The underscoring and italics in this brief are ours.)

This order was predicated upon certain alleged findings of fact by the Interstate Commerce Commission, made in a proceeding instituted by certain carriers operating within the State of Tennessee, complaining of the failure of the Railroad and Public Utilities Commission of Tennessee to authorize increases in intrastate rates on road-building material consigned to municipal agencies, including sand, gravel, brick and sewer pipe. The application of the carriers for an order from the Interstate Commerce Commission authorizing the increases in rates on brick and sewer pipe was denied, a written report of the Commission holding that the carriers had not shown that the lower schedule of rates on those commodities resulted in undue preference or prejudice against interstate commerce, although the Interstate Commerce Commission said in its written report *that the carriers estimated* that the proposed increase in the intrastate rates on brick "would add $12,800.00 a year to the revenues" of four of the railroads affected.

63 I. C. C. Rep, 167.

In the written report on the stone and gravel rates, the rates involved in this suit, the Interstate Commerce Commission also stated that theree of the carriers affected "estimated" that the refusal of the Tennessee Commission to permit the proposed increases in rates on municipal stone and gravel is costing them, in the aggregate, about $16,445.00 annually.

63 I. C. C. Rep., pp. 176, 177.
(Exhibit "A," to Original Bill.)

The Interstate Commerce Commission did not, however, make any finding of its own with regard to the difference in revenue accruing to the carriers in Tennessee on account of the failure of those carriers to increase their intrastate rates on municipal stone and gravel in the same proportion that interstate rates were increased by virtue of the order

in *Ex Parte* 74. Only an estimate of three of the carriers affected was stated, in passing.

The order of the Interstate Commerce Commission on the stone and gravel rates was based upon a finding by the Commission that the failure of the carriers in Tennessee to increase their rates on municipal stone and gravel, intrastate, "has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states, and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee." So much was the Commission's finding of fact. Its conclusion of law was then stated, as a part of the same sentence, that the undue prejudice and undue preference so found to exist resulted "in unjust discrimination against interstate commerce."

See Exhibit "A," to Original Bill.

Appellees deny that the finding of the Commission, that the lower schedule of intrastate rates resulted in unjust discrimination against interstate commerce, was a finding of fact. It was only a conclusion of law, erroneously conceived because of the Commission's error in concluding that the prejudice to persons and localities in adjoining states and the preference to persons and localities in Tennessee with respect to governmental shipments constituted "undue" prejudice and preference made unlawful by the Interstate Commerce Act of Congress.

A comparison of the findings of the Interstate Commerce Commission with the written report, will show that the only finding of fact or conclusion of fact which the Interstate Commerce Commission intended to make, as a basis for its order, was a finding that the relation of published rates was such that persons or shippers in Tennessee were preferred and favored to the prejudice of persons and shippers in adjoining states.

The order of the Interstate Commerce Commission, based upon such finding, is void for two reasons.

First. Undue prejudice and preference between shippers can exist only by reason of the relation of rates legally fixed to which the carriers affected are required to adhere. The Interstate Commerce Commission is powerless to fix a legal rate for interstate shipments of stone and gravel shipped as the property of the federal or a state or municipal government. The power of the Interstate Commerce Commission is limited to the fixing of a *maximum* rate which the carriers may charge for such transportation in interstate commerce. Such a maximum rate, from which a carrier is at liberty to depart at will, by published tariff or by secret agreement, can form no basis or measure or standard for a finding of discrimination by comparison with other published rates.

Second. The prejudice to shippers and localities of states adjoining Tennessee and the preference to shippers in Tennessee when shown by the Commission to exist and resulting by reason of the lower level of intrastate rates on shipments of governmental property do not constitute undue preference and undue prejudice which are made unlawful by Congress; and therefore, no unlawful condition exists by reason of the relations of rates which the Interstate Commerce Commission is authorized to remove.

Both propositions result from the necessary and obvious construction of that part of Section 22 of the Interstate Commerce Act quoted in the opinion of the District Court, and from the application the Interstate Commerce Commission has given to the section in its Conference Rulings in force at the time of the making of the order involved herein and at the present time.

Conference Rulings adopted by the Interstate Commerce Commission and issued in bulletin form for the guidance of carriers in interstate commerce, are quoted in the original bill, in Section IV thereof. By these rulings the various interstate carriers were notified that Section 22 of the Interstate Commerce Act was construed by the Commission "to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as

is provided for in said Section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations except in the issuance, sale and use of mileage, excursion or commutation passenger tickets, and joint interchangeable mileage tickets."

Original Bill, Sec. IV.

(References to the printed record cannot be made herein for the reason that the record has not been printed at the date of the preparation of this brief, which is necessarily prepared in advance of the filing of the petition for supersedeas.)

In the report of the Interstate Commerce Commission in *United States* v. *Alabama & Vicksburg Railway Co., et al.*, 40 I. C. C., 405, the Commission held that it had authority to prescribe reasonable ratings for carload shipments of stamped envelopes and post cards shipped as the property of the United States, "although the carrier and the Government may agree upon some other rate." The Commission further said, however, that the effect of its action in fixing such a rate is only to fix the *maximum* rate which the carriers may *demand* from the Government.

*United States* v. *Ala. Vick. Ry. Co., et al.*, 40 I. C. C., 405.

The published tariffs of the interstate carriers showing rates for interstate shipments into Tennessee of municipal stone and gravel, published pursuant to the order *Ex Parte* 74, were only maximum rates which the carriers were allowed to charge for such transportation, and were not legal rates from which the carriers were not authorized or permitted to depart.

In the report of the Interstate Commerce Commission in the proceedings instituted by the carriers, pursuant to which the order involved herein was made, the Commission observed: "Respondents show that they follow the *general policy* of publishing in the regular manner such municipal rates as they maintain."

63 I. C. C. Rep., 172.

(Exhibit "A," to the Original Bill.)

The finding of the Interstate Commerce Commission of undue prejudice and undue preference was therefore based upon a comparison of intrastate rates with "the general policy," voluntarily pursued, by the carriers who were respondents to the proceeding before the Commission.

Such a comparison would not support a finding of preference and prejudice, even if only interstate rates were involved.

In *Louisville and Nashville Railroad Co.* v. *Maxwell*, 237 U. S., 94, the Supreme Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."
>
> 237 U. S., p. 97.

A legal rate which can constitute a measure of discrimination is a rate which has the certainty and to which the strict adherence is required, described in the foregoing quotation. It is the certainty with which interstate carriers are compelled to adhere to their published and duly filed rates, as indicated in the quotation from *Railroad* v. *Maxwell, supra*, which constitutes the basis of a finding of discrimination, and which was the foundation of the holding of this court in the noted Shreveport case (*Houston E. & W. T. Ry. Co., et al.* v. *United States*, 234 U. S., 342.) and other similar cases, that the Interstate Commerce Commission may order interstate carriers to make their intrastate rate structure conform to the level of their published and duly filed interstate rates, when it is shown that the two structures are related in the manner described in those cases. It is respectfully submitted that this court would

never have upheld the Interstate Commerce Commission in its order affecting intrastate rates in the Shreveport case, if the level of interstate rates to which the intrastate rate structure was made to conform had been one from which the interstate carriers were at liberty to lawfully depart by secret agreement with interstate shippers.

If the interstate rate which the carrier may *collect* is fixed according to the will and volition of the carrier, without the knowledge, approval or authority of any agency of the Federal Government, as in the case of the transportation of governmental property, it is a rate fixed by the carrier and not by the Federal Government, and an interstate rate so fixed cannot be the basis of an order of the Interstate Commerce Commission requiring an increase of the intrastate rate to the level of the interstate rate.

Minn. Rate cases, 230 U. S., 352, 417.

In making this contention appellees are not attacking or challenging the finding of the Interstate Commerce Commission that comparison of the intrastate rates in question as allowed by the Tennessee Commission with the published interstate rates on the same kind of shipments fixed pursuant to *Ex Parte* 74 shows a preference to shippers in Tennessee as against shippers in adjoining states; but the contention is that since the interstate carriers are not bound to adhere to the interstate rates published pursuant to Ex *Parte* 74 in transporting governmental property, the disparity in the *published* rates does not constitute or show a real discrimination or a real preference to Tennessee shippers as against shippers from adjoining states.

In the recent case of *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Company*, decided by this Court on February 27, 1922, and reported at page 237 of the Advance Opinions of Volume 66 of the Law Edition of the Supreme Court Reports, this Court concluded the opinion as follows:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount

power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

*R. R. Com. Wis.* v. *C. B. & Q. R. R. Co.*, Decided Feb. 27, 1922.

The discrimination found to exist in the rates involved erein cannot be the "real discrimination" which this Court ferred to in the preceding quotation as the condition prece- nt to the exercise by the Interstate Commerce Commission control over intrastate rates.

Again the Supreme Court in *Illinois Central Railroad* . v. *Public Utilities Commission of Illinois, et al.*, 245 S., 493, 510, said:

"In construing the Federal statutes enacted under the power conferred by the Commerce Clause of the constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. (Citing cases.) This being true of an Act of Congress, it is obvious that an order of subordinate agency, such as the Commission, should not be given precedence over a State Rate Statute otherwise valid, unless, and except, so far as, it conforms to a high standard of certainty."

*Illinois Central R. R.* v. *Pub. Utilities Com.*, 245 U. S., 493, 510.

Under the construction placed upon Section 22 of the erstate Commerce Act by the Interstate Commerce Com- sion, referred to hereinabove, carriers may depart at from published rates for the transportation interstate of ernmental property. A published rate, filed voluntarily by rrier, from which it may depart at will by secret agree- t, can form no basis for a finding of unjust discrimina- against interstate commerce, resulting from the rela-

tion of such published rate to intrastate rates, to remove which the Interstate Commerce Commission may exercise control over purely intrastate rates.

The power of the Interstate Commerce Commission over a rate structure is the same, or at least, closely akin to the jurisdiction of a court. Jurisdiction includes not only the power to make an order, but the power to enforce such order. If the order now under attack related alone to interstate rates and was made to remove a discrimination existing by reason of disparity in interstate rates, the Interstate Commerce Commission, by its Conference Rulings, concedes its inability to compel adherence by the carriers to its order fixing rates on governmental property. If such power does not exist with regard to an order fixing interstate rates, then certainly it could not exist with regard to a similar order affecting intrastate rates. The result is that the order of the Interstate Commerce Commission now under attack is one which the Interstate Commerce Commission is powerless to require the carriers to adhere to; yet, by reason of the paramount power of a federal agency over a similar state agency, the carriers may use the order of the Interstate Commerce Commission as authority to violate and flaunt the order of the State Commission. The holding of this Court hereinabove quoted from *Illinois Central Railroad* v. *Pubilc Utilities Commission of Illinois* refutes any contention that Congress intended to bestow such a power upon the Interstate Commerce Commission.

If Appellees are in error in their contention that the report of the Interstate Commerce Commission does not authorize or support a finding of the existence of prejudice to shippers in adjoining states and preference to shippers in Tennessee, and if Appellees are wrong in their contention that the finding of such preference and prejudice is shown to be baseless and unsupported on the face of the report, as above set out, then the Appellees assert, with confidence, that the effect of Section 22 of the Interstate Commerce Act, as construed by this Court, is to exclude such preference and prejudice from the unlawfulness defined by

Sections 2 and 3 of the Interstate Commerce Act, and to authorize such prejudice and preference as lawful.

*Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 263.

In the case cited, the Court said:

"The unlawfulness defined by Sections 2 and 3 consists either in 'an unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of Section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust."

*I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S., 263.

It is stated in the brief filed herein for Appellants, the Railroads, that the holding of this Court in the case cited is *obiter dictum*; but Appellants do not suggest any other construction which can be given to the language of Section 22, affecting shipments of governmental property, without destroying it.

The prejudice and discrimination alleged to exist in the relation of the rates involved herein exist not by reason of rates put into effect by a single carrier, but they exist by reason of the relation of rates of a number of carriers. Unless Section 22 is to be construed as in the case of *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, *supra*, one carrier may not transport the property of a governmental agency free or at reduced rates unless all other carriers serving the same territory grant a like privilege and concession to the same governmental agency and other governmental agencies similarly located.

If the prejudice and preference found by the Interstate Commerce Commission to exist in relation to the rates involved herein be not unlawful, there can be no question but that the Interstate Commerce Commission was without power to make the order here attacked.

Appellees insist respectfully, upon the foregoing, that the petitioners are not entitled to a *supersedeas* of the order of the District Court because it clearly appears from the record that on the final hearing said order will be affirmed.

## II.

## THE PETITIONERS ARE NOT ENTITLED TO ASK *FOR SUPERSEDEAS*

Effort has been made hereinabove to show that the order of the Interstate Commerce Commission involved herein was based *alone* upon a finding by the Interstate Commerce Commission that the existing relationship between intrastate rates and interstate rates preferred shippers in Tennessee to the prejudice of shippers in adjoining states.

The persons and localities injuriously affected were not complainants in the proceeding before the Interstate Commerce Commission in which the order was made. The Transportation Act of 1920, however, authorized carriers "concerned" to institute the proceeding before the Interstate Commerce Commission; the language of that Act apparently giving the carrier the right to institute such an investigation whether injuriously affected or not. This provision is contained in Paragraph 3 of Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920.

41 Statutes at Large, 484.

This statutory authority for a proceeding before the Interstate Commerce Commission at the complaint of carriers concerned, resulting in an order removing a discriminatory rate because injuriously affecting persons other than the carriers who instituted the proceeding, is wholly foreign to the principles of a court of equity, which confines its processes to the relief of complainants injuriously affected by the subject matter against which the process of the court is invoked.

The United States, the original defendant, placed by the statute primarily in control of the defense, and the Interstate Commerce Commission, which Commission made the order annulled by the District Court, have appealed, but are not seeking the supersedeas. They primarily must be considered as acting in this case for the benefit of the persons and localities in the states adjoining Tennessee against whom the Interstate Commerce Commission found prejudice in the rate structures involved.

From a statement made by the Interstate Commerce Commission in its written report that the Tennessee Commission, in authorizing an increase in the rates on stone and gravel for commercial purposes, "impliedly approved the general level *of those rates as increased,*" the carriers argue that the Interstate Commerce Commission found that the lower level of intrastate rates on municipal shipments of stone and gravel were unreasonable as providing inadequate compensation to the carriers performing the service of transportation. No such argument is justified by anything said by the Interstate Commerce Commission or by anything in the record. The Interstate Commerce Commission was not concerned with the reasonableness of the Tennessee rates as affected by the right of the carriers to have adequate compensation for the services performed by them in such transportation. Such questions were for the Tennessee Commission, and the Interstate Commerce Commission is concededly without jurisdiction to so control intrastate rates as to secure to the carriers reasonable compensation for their services in intrastate commerce. There is no finding therefore by the Interstate Commerce Commission that the higher level of intrastate rates on municipal stone and gravel is necessary to compensate the carriers for their services.

This is made clear by the holding of this Court in *American Express Co.* v. *Caldwell*, 244 U. S., 617, 624, as follows:

> "But the finding that discrimination exists and that interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S., 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."
>
> *American Express Co.* v. *Caldwell*, 244 U. S., 617, 624.

There is nothing in the record to indicate that the Tennessee Commission declined to permit the railroads in Ten-

nessee to increase their intrastate rates on municipal shipments of stone and gravel for road-building purposes on the ground and theory that the governmental agencies were entitled to a preference. There is nothing to indicate that the Tennessee Commission's order was based upon any other consideration except a finding by that Commission that for such transportation the rate fixed was reasonable and adequate; and if, as petitioners contend, the Tennessee Commission had no power to require the carriers in Tennessee to carry governmental property "at reduced rates," then this Court should not presume that the Tennessee Commission acted unlawfully and based its order declining the increase on any such consideration.

Authority may be found in the reports of the Interstate Commerce Commission for a classification of carload shipments of stone for road-building purposes in the exercise of the rate-making power. In its report in *State of Maryland* v. *Pennsylvania Railroad Co., et al.*, 30 I. C. C., 22, 25, the Interstate Commerce Commission had under consideration proposed increased rates "for the transportation of interstate shipments of crushed stone for road-making purposes." In considering the reasonableness of the proposed rate on such commodity, the Interstate Commerce Commission exercised its common knowledge, without reference to any proof, by the following finding:

> "Road stone is a very low grade commodity; it loads generally about sixty thousand pounds to the car, requires only ordinary transportation equipment, and is free from claims for damage in transit."
> 30 I. C. C. Rep., 22, 25.

Volume of traffic may also be considered in determining an adequate and reasonable rate on a given commodity. Counsel for Appellants, the Railroads, refer to the colossal road-building program of the state and federal governments. It may fairly be inferred from the existence of such a program that the Tennessee Commission contemplated the movement of stone and gravel for road-building purposes in train loads, or in lots more than a single car load, all of which affects the expense of transportation.

In the case above cited the carrier of its own initiative had evidently made a difference in its proposed rates on crushed stone for road-making purposes and its rate on crushed stone for commercial purposes.

The Interstate Commerce Commission reports also contain another instance of the practice of making a different rate on stone for road-building purposes from the rates on stone for commercial purposes. In Louisiana Rates, 60 I. C. C., 428, the Commission stated that it was shown in argument that the Illinois Central Railroad, one of the appellant companies here, had filed with the Commission schedules of interstate rates for transportation of "municipal sand and gravel," for streets, etc., which were lower than interstate rates on commercial shipments of sand and gravel to and from the same point.

60 I. C. C., 378.

With these instances of the implied approval of the Interstate Commerce Commission of the practice of making a different rate for transportation of municipal stone and gravel for road purposes from the rate between the same points on commercial shipments of stone and gravel, it cannot be reasonably argued, without proof and without a finding of fact by the Commission, that the order of the Tennessee Commission was not based upon a substantial difference in the traffic affected, and a finding that the rate fixed by it was high enough to afford adequate compensation to the carrier affected for the services performed.

The situation then is that the Railroads are seeking by supersedeas to have restored a rate higher than the rate found to be adequate and compensatory by the only tribunal authorized to determine the question which has ever investigated the adequacy of such rates as affording sufficient compensation for the services performed; such effort being based upon the authority of an order of the Interstate Commerce Commission made for the benefit of persons and localities who are not before the Court except as they may be represented by the Government and by the Interstate Commerce Commission, and not made for the benefit of the petitioning railroads.

Appellees insist that the railroads petitioning for supersedeas have no standing in this Court, as a court of equity, in their appeal to the discretion of the Court.

In the petition filed in this Court for supersedeas the carriers state as the reason for their insistence that a supersedeas is necessary, that in the event the appeal should be successful, the carriers would be compelled to sue two shippers, the State and the Federal Government, for the difference between the rate authorized by the Tennessee Commission and the rate authorized by the Interstate Commerce Commission, which suits the carriers say would be difficult because of the sovereign capacities of the two shippers, and also they would be required to sue the various counties and municipalities of Tennessee, resulting in inconvenience to the carriers.

Appellees reply that if a supersedeas be granted, not merely inconvenience will result to them, and to the various counties and municipalities of Tennessee, but irreparable injury; in that during the road-building season, the summer and fall months of the present year, traffic in road-building material will be diverted entirely from intrastate commerce to interstate commerce, resulting in the permanent loss to Appellees, and to the United States Government, of the difference between the intrastate rates and the interstate rates, unless the carriers, of their own free will and volition, consent to exercise the authority vested in them by Section 22 of the Interstate Commerce Act and grant to Appellees reduced rates in the transportation of their road-building material.

Appellees respectfully insist that the petition for supersedeas should be denied.

Respectfully submitted,

FRANK M. THOMPSON,
*Attorney General of Tennessee.*

WM. H. SWIGGART, JR.,
*Assistant Attorney General of Tennessee.*

WASHINGTON, D. C., May 29, 1922.

Office Supreme Court, U. S.
FILED
MAY 27 1922
WM. R. STANSBURY
CLERK

No. 988

# Supreme Court of the United States

OCTOBER TERM, 1921.

**The United States, the Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga and St. Louis Railway,** *Appellants.*

*versus* NO. 988

**The State of Tennessee, The Railroad and Public Utilities Commission of Tennessee, et. al.,** *Appellees.*

On Appeal from United States District Court
Middle District of Tennessee.

## MOTION ON BEHALF OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY FOR WRIT OF SUPERSEDEAS.

JOHN BELL KEEBLE,
CHARLES N. BURCH,
FITZGERALD HALL,
*Counsel for Appellant Carriers.*

May, 1922.

AMBROSE PRINT. NASHVILLE

# Supreme Court of the United States

OCTOBER TERM, 1921.

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**The United States, the Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway.**

*Appellants,*

*versus* *No. 988*

**The State of Tennessee, The Railroad and Public Utilities Commission of Tenneseee, et al.**

*Appellees.*

**MOTION ON BEHALF OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY FOR WRIT OF SUPERSEDEAS.**

*To the Honorable The Supreme Court of the United States:*

Come the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway and move the court for the issuance of a writ of supersedeas to suspend (pending appeal to this court perfected May 20, 1922) the final decree of the United States Dis-

trict Court for the Nashville Division, Middle District of Tennessee, rendered on April 24, 1922, in this cause, entitled below "State of Tennessee vs. United States, et al. Said final decree of the District Court enjoined the enforcement of an order of the Interstate Commerce Commission and adjudged said order of the Interstate Commerce Commission to be void. Said order of the Interstate Commerce Commission directed an increase in certain intrastate rates. as shown below.*

**Grounds of Motion.**

Following Ex Parte 74 ("Increased Rates 1920, 58 I.C.C., 220") Tennessee carriers, after increasing interstate rates in accordance with the direction of the Interstate Commerce Commission in said proceeding, undertook to make similar increases in rates and charges for intrastate movements within the State of Tennessee. After hearing and some delay the Railroad and Public Utilities Commission of the State of Tennessee made an order, dated November 19, 1920, approving such increase, except on one commod-

*Application for supersedeas in this cause was duly presented to Mr. Justice Day at Chambers at his residence in Washington May 16, 1922, and after a consideration thereof he directed that such application be made to the Court on May 29, 1922, such application being made under section 210 of the Judicial Code.

ity not now involved and "*on carload shipments of stone and gravel moving intrastate between points in Tennessee when for use in building public highways and consigned to federal, state, county or municipal authorities or their bona fide agents. .... .*" (R., p. 17.)

The carriers thereupon applied to the Interstate Commerce Commission for relief from said order of the Tennessee Commission and on August 13, 1921 (63 I. C. C. 160), "In the Matter of Intrastate Rates and Charges in the State of Tennessee," No. 12132, the Interstate Commerce Commission found after full hearing that the rates and charges prescribed by the Tennessee Commission resulted in;

(a) Undue prejudice to persons and localities in states adjoining Tennessee;

(b) In undue preference to persons and localities in Tennessee;

(c) In unjust discrimination against interstate commerce.

(d) "We further find that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in carloads, under our decision relating to the southern

group in Ex Parte 74, result in *reasonable charges for the interstate transportation* of those commodities between points in Tennessee and points in adjoining states. . . ." (63 I. C. C., p. 177) (R., p. 36.)*

(e) "We find that said undue prejudice, preference, and discrimination can and should be removed by *making increases in the intrastate rates for the transportation of stone and gravel,* in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, *which shall correspond with the increases heretofore made and now in effect as aforesaid in the interstate rates* for the transportation of said commodities shipped in interstate commerce between points in Tennessee and points in adjoining states." 63 I. C., 177-8. (R., pp. 36-37.)

Thereupon, the State of Tennessee and the Railroad and Public Utilities Commission of Tennessee instituted this suit by filing a bill in the United States Dstrict Court, Nashville Division, Middle District of Tennessee, against the

*Record citations refer to original record.

United States for the purpose of having said order of the Interstate Commerce Commission declared to be unlawful and void and thereby re-establish said order of the Tennessee Commission dated November 19, 1920. (Exhibit A to original bill, R., pp. 14, 16.)

The Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway intervened. Hearing was had before three judges on motion to dismiss.

The predicate of the bill was that the power which the Interstate Commerce Commission has to maintain parity and equality between interstate and intrastate rates does not exist when the commodities transported are consigned to the federal or state governments and political sub-divisions thereof, and that Sections 2 and 3 of the Act to Regulate Commerce do not apply to transportation for those classes specified and designated in said Section 22; in other words, that *there exists a large volume of traffic subject to no laws, no rules, no regulations.*

Three judges considered the case, sustained the complainants' contention and granted an injunction, a final decree being entered.

The intervening carriers perfected an appeal to this honorable Court May 20, 1922. The United States and the Interstate Commerce Commission have perfected separate appeals. Said carriers therefore move the Court for a writ of supersedeas pending appeal, hearing and determination of this cause and express their willingness to enter into bond in any amount upon such conditions as to the Court may seem right and proper, said supersedeas being indispensable to protect the interests of said cariers for the following reasons:

**Necessity for Supersedeas.**

1. Should the carriers' appeal be prosecuted to effect without supersedeas, their only remedy would be (a) to sue the United States and the State of Tennessee, *two sovereign powers*, which have not consented to be sued in such a case, and (b) to sue the various counties and municipalities which could be done but would involve a *multiplicity of lawsuits*.

2. On the other hand, if the writ of supersedeas be granted as prayed, adverse parties will

be fully and completely protected by the supersedeas bond, and should the carriers not be successful on appeal, such adverse parties will have no difficulty in promptly recovering the full amount to which they and each of them may be entitled.

For these reasons and on this account, said carriers respectfully move for a writ of supersedeas in this case and respectfully request the Court, in the event the supersedeas be allowed, to designate the amount of the bond,* the conditions thereof and whether it will accept the United States Fidelity and Guaranty Company as surety on the bond.

Due notice has been given the adverse parties of the filing and presentation of this motion. Separate brief and argument on the merits of the cause have been duly filed and are respectfully presented with this motion.

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*As to the amount of bond see affidavit of H. F. Smith hereto attached, page 15 infra. The carriers make no question as to the amount. Appellees were unwilling to express their wishes as to the amount should supersedeas be granted.

THE LOUISVILLE & NASHVILLE RAILROAD, COMPANY,

By JOHN BELL KEEBLE,
*Attorney.*

THE ILLINOIS CENTRAL RAILROAD COMPANY,

By CHARLES N. BURCH,
*Attorney.*

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

By FITZGERALD HALL,
*Attorney.*

On behalf of the appellees, complainants below, I, the Assistant Attorney General of the State of Tennessee, acknowledge full and complete notice of the filing and presentation of this motion and receipt of a copy of the brief and argument accompanying same.

W. H. SWIGGART, Jr.,

*Assistant Attorney General of the State of Tennessee and Counsel for Appellees.*

## SYNOPSIS OF BRIEF*

This is an application for a writ of supersedeas by interested carriers to suspend an order of the District Court enjoining an order of the Interstate Commerce Commission made after full hearing directing an increase in certain intrastate rates in Tennessee in order to maintain a proper relationship between interstate and intrastate rates and prevent the resulting discriminations against both persons, localities and interstate commerce, (R., 36-37); an exercise of power sustained by this Court in the recent Wisconsin and New York rate cases, 42 Supreme Court Reporter, 232, 239.

The Interstate Commerce Commission after hearing found *as a fact* from the evidence that the order of the Tennessee Commission resulted in undue prejudice to persons and localities in States adjoining Tennessee; in undue preference to persons and localities in Tennessee; and unjust discrimination against interstate commerce; and *directed a removal of this discrimination by increasing the intrastate rates.* Not only

*Separate brief on the merits has been filed.

is there material evidence to support its finding —and it is therefore not subject to challenge here *on the facts, Manufacturers Ry.* v. *United States*, 246 U. S., 457,—but it was unchallenged by complainants below, appellees here.

Appellees seek to find an exception to the rule so recently announced by this Court in the Wisconsin and New York cases, supra, claiming (a) that the Tennessee Commission has the power to compel carriers against their will to give preference to the Government, the State and the political subdivisions thereof, *regardless of the resulting discriminations and burdens*, and (b) that the Interstate Commerce Commission has no supervision of traffic moving to consignees designated in Section 22 of the Interstate Commerce Act and that said section so removes from the Act transportation to those enumerated therein as not to be subjected to its various provisions, particularly Sections 2 and 3 thereof.

The carriers' position on the application for a supersedeas is briefly as follows:

(1) The case being one of first impression and it being entirely possible to protect the adverse parties by the execution of a supersedeas

bond, this Court should exercise the discretion vested in it by Section 210 of the Judicial Code (U. S. Compiled Statutes, Section 999) by granting a supersedeas, because, should a supersedeas not be obtained and the carriers be successful, they will not be able to sue two interested parties, namely, the United States and the State of Tennessee, being sovereigns which have not consented to be sued; and because collection from the various counties and municipalities in the State would involve a multiplicity of lawsuits.

(2) The Tennessee Commission is a statutory body with no inherent power and is not vested with the right and power to compel carriers to give preferences to any persons, places or descriptions of traffic. *New River Lumber Co.* v. *Tennessee Ry.*, (Tenn.) 238 S. W., 867; *Gulf & Ship Island R. Co. v. R. R. Com.*, 94 Miss., 124, 49, So., 118. Under the Tennessee law, quoted in full in the brief filed with their motion for supersedeas, carriers have no express power to give preferences to the United States, the State of Tennessee, the counties and municipalities thereof. The Tennessee Commission having no power, express or implied, to force carriers against their will to give any preferences, the

order of the Tennessee Commission was *ultra vires* and void, so the appellees are in no position to challenge the validity of the order of the Interstate Commerce Commission.

(3) Section 22 of the Interstate Commerce Act is not subject to the construction contended for by appellees. Traffic moving thereunder is subject to the law, not entirely free from regulation. There is a limit to the preferences that may be given thereunder. *In fact, no preference can be given which results in a violation of other sections of this Act.* This court has many times held that Section 22 must be construed together with various other sections of the statute, and in *Pennsylvania Railroad* v. *Puritan Coal Co.*, 237 U. S., 121, 130, said that said section was to be construed "in connection with the statute as a whole," a conclusion inconsistent with the opinion of the District Court in the case at bar.

In conclusion, we have the following situation: The Interstate Commission has approved as reasonable certain rates for interstate commerce; the Tennessee Commission has approved as reasonable those *same rates* for all intrastate commerce save stone and gravel consigned to the

United States, the state, counties and municipalities for the limited purpose of building roads and for no other; the Interstate Commerce Commission conformably to Section 13 of the Interstate Commerce Act investigated the effect of said order of the Tennessee Commission and found that it imposed an undue burden on interstate commerce and an unjust discrimination against persons and localities in adjoining states —no question being made by appellees that the facts did not justify this conclusion of fact by the Commission—and ordered the carriers to increase their intrastate rates. *The District Court held that the Interstate Commission was without power to thus protect interstate commerce and shippers in interstate commerce against said order of the State Commission.*

The burden being upon those who challenge a decision of this Court or undertake to develop exceptions thereto, it would seem that no legitimate objection can be made to the granting of a supersedeas pending appeal, particularly where the two most interested parties are sovereign powers against which in the absence of supersedeas the carriers, if successful, could obtain no relief under existing laws.

It is respectfully submitted that sufficient ha
been shown to warrant this Honorable Court i
exercising its discretion in favor of granting th
supersedeas.

Respectfully submitted,

JOHN BELL KEEBLE,

CHARLES N. BURCH,

FITZGERALD HALL.

*Attorneys for Appellant Carriers.*

May, 1922.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

I, H. F. Smith, being duly sworn, state as follows: I am the Vice President and Traffic Manager of The Nashville, Chattanooga & St. Louis Railway and am familiar with the proceedings in this cause, the effect upon the rates and the general amount and character of the traffic affected on the three railroads.

The difference in the rates ordered by the Interstate Commerce Commission and those ordered by the Tennessee Commission amounts generally on an average to about $12.00 per car. It is my judgment—and this of necessity is an estimate—that between the present date and January 1, 1923, not more than four thousand (4000) cars of stone and gravel will move in Tennessee over these three roads affected by the rates involved in this case so that in my judgment a bond of $50,000 would fully and amply protect all adverse interested parties.

H. F. SMITH.

Signed and sworn to before me this
25th day of May, 1922.

W. A. MILLER
*Notary Public.*